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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MICHAEL R. NEWFIELD et al.,

Plaintiffs and Respondents,

v.

EVANGELINE V. CALUB,

Defendant and Appellant.

B173710

(Los Angeles County
Super. Ct. No. BC290271)

APPEAL from a judgment of the Superior Court for the County of Los Angeles.
Dan Thomas Oki, Judge. Reversed and remanded with directions.

Amante A. Pimentel for Defendant and Appellant.

Hill, Farrer & Burrill, Scott L. Gilmore and Gretchen D. Stockdale for Plaintiffs
and Respondents Michael Newfield and Vada Klein.

SUMMARY

Purchasers of items of personal property appeal from the trial court's denial of their motion to set aside a default and default judgment entered in favor of the sellers. We conclude appellants failed to meet the statutory requirements for relief from default under the mandatory and discretionary provisions of Code of Civil Procedure section 473.¹ However, appellants did satisfy the requirements for the exercise of the court's equitable powers to set aside the defaults. Additionally, the proposed answer filed with appellants' motion met the responsive pleadings requirements imposed by section 431.30.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a series of transactions in which appellants purchased from respondents items of estate jewelry, watches and other personal property allegedly valued at \$340,000.

Respondents claimed appellants breached their agreement to pay for the items of personal property by presenting checks drawn on insufficiently funded accounts. They further claimed appellants never intended to pay for the items, despite their agreement to do so. Represented by counsel, respondents filed a verified complaint against appellants on February 2, 2003 asserting, among others, causes of action for breach of contract, fraud and conversion.

Appearing in propria persona, appellants filed an answer on March 21, 2003. Respondents moved to strike the answer on the grounds it lacked verification and failed to separately respond to each paragraph of the complaint. At the May 12, 2003 hearing on the motion, at which appellants were represented by counsel, the trial court granted the motion to strike and permitted appellants an additional week from the hearing date to file and serve a proper, verified answer. A further answer was not filed. As a result, a default was entered on May 20, 2003 and a default judgment was entered against appellants on

¹ All further undesignated statutory references are to the Code of Civil Procedure.

October 23, 2003 in the amount of \$428,163, representing the principal amount owed, pre-judgment interest and statutory damages.

Represented by new counsel, appellants moved to set aside the default and default judgment on December 19, 2003 on the ground that the failure to file an answer was due to their first attorney's neglect or misconduct as well as their own mistake.

Following a hearing on February 2, 2004, appellant's motion to set aside the default and default judgment was denied. The trial court specified three reasons for its denial. First, despite appellants' assertion that the defaults resulted from attorney neglect or misconduct, the motion was not accompanied by a sworn affidavit of fault from their first attorney, as required by section 473(b). Second, although defaulting parties may move for discretionary relief from default based on their own mistake, inadvertence, surprise or excusable neglect, section 473(b) requires the filing of the motion within six months of entry of default. Appellants' motion, however, was not filed until December 19, 2003, more than six months after the May 20, 2003 entry of default. Third, the proposed answer which accompanied the motion failed to comply with the responsive pleading requirements of Code of Civil Procedure section 431.30 because it constituted a general, rather than a specific, denial submitted in response to a verified complaint.

From the order denying their motion to set aside the default and default judgment, appellants filed a timely appeal.

STANDARD OF REVIEW

An order denying a motion to set aside a default under section 473 is reviewed under an abuse of discretion standard. (*Hu v. Fang* (2002) 104 Cal.App.4th 61.) Further, a denial of relief from default on equitable grounds is reviewed under the same standard. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975.)

DISCUSSION

1. Appellants failed to meet the statutory requirements for relief from default under the mandatory and discretionary provisions of Code of Civil Procedure section 473.

Section 473(b) requires a trial court to vacate a default resulting from an attorney's mistake, inadvertence, surprise or excusable neglect if the motion seeking relief from default is accompanied by an attorney's sworn affidavit of fault, is made no more than six months after the entry of default judgment, and is accompanied by a proposed answer. (*Hu v. Fang, supra*, 104 Cal.App.4th at p. 64.) Although appellants asserted that their first attorney neglected to file an answer to the complaint on their behalf, their motion for relief from default was denied, in part, due to their failure to include with their motion a sworn affidavit of fault by the attorney.

Appellants concede that their motion was not accompanied by a sworn affidavit of fault from their first attorney. However, they argue an affidavit was unnecessary because the attorney had not merely been negligent, but had abandoned them. The abandonment argument will be discussed later in this opinion.

In addition to the mandatory attorney fault provisions, defaulting parties may seek discretionary relief under section 473 on the ground that the default was entered as a result of their own mistake, inadvertence, surprise or excusable neglect. (*Lorenz v. Commercial Acceptance Insurance Co.* (1995) 40 Cal.App.4th 981.) A motion for discretionary relief, however, must be filed within six months of entry of default. (*Rutan v. Summit Sports* (1985) 173 Cal.App.3d 965.)

Appellants did not comply within the six-month deadline for seeking discretionary relief. Their motion was filed on December 19, 2003, more than six months after the May 20, 2003 entry of default. Moreover, appellants failed to assert mistake, inadvertence, surprise or excusable neglect on their part. Instead of demonstrating that they were mistaken as to the date the responsive pleading was due, they claimed they relied on their first attorney to file an answer on their behalf. They also did not demonstrate surprise or excusable neglect, which requires that defaulting parties establish

the default could not have been avoided through their exercise of ordinary prudence and due care. (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58.) To the contrary, respondents established that, despite several requests to do so, appellants failed to go to the first attorney's office to sign the verification of their answer to the complaint.

2. Appellants satisfied the requirements for the exercise of the court's equitable powers to set aside the default.

A trial court may grant relief from default on equitable grounds notwithstanding the defaulting parties' failure to demonstrate an entitlement to mandatory or discretionary relief under section 473 or their inability to satisfy the statutory timeliness requirement. Equitable relief, however, may be afforded only in exceptional circumstances. (*Rappleyea v. Campbell, supra*, 8 Cal.4th 975, 981.)

Appellants argue the trial court abused its discretion by failing to exercise its equitable powers upon a showing that they had been abandoned by their first attorney. On the other hand, respondents argue appellants are precluded from asserting attorney abandonment on appeal because they only asserted attorney neglect or misconduct in the trial court. Liberally construing the language of a declaration submitted with their motion, appellants offered evidence in the trial court that their first attorney failed to contact them after the May 12, 2003 court hearing or keep them informed about developments in the case and that they had no actual notice of the default or default judgment until they went to the courthouse in October 2003 to ascertain the status of their case.

Where the defaulting parties' failure to file an answer is based upon extrinsic mistake such as attorney abandonment, the parties are required to demonstrate diligence in seeking to set aside a default following discovery and the existence of a meritorious defense to the action. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143.) Appellants demonstrated reasonable diligence by moving to set aside the default and default judgment within sixty days after learning of the defaults. Moreover, appellants' proposed answer, as will be discussed, revealed the existence of a meritorious defense.

3. Appellants' proposed answer satisfied the statutory requirements for responsive pleadings.

Relief from a default judgment under section 473 necessitates that a proposed answer, which satisfies the responsive pleading requirements of section 431.30, must accompany a motion to set aside the default. (*Hu v. Fang, supra*, 104 Cal.App.4th at p. 65.) The requirement of a proposed answer is intended to demonstrate that relief is not sought merely for the purposes of delay. (*Ibid.*)

Respondents argue appellants failed to comply with section 431.30 in that their proposed answer essentially constituted a general denial to a verified complaint. Specifically, they argue the proposed answer did not separately respond to the paragraphs of the complaint with an admission, denial or other appropriate response. A review of the proposed answer, however, reveals its compliance with section 431.30 in its essential reflects. The proposed answer denies specific paragraphs of the complaint and asserts the affirmative defenses of full performance, forgery, and unclean hands, even though the defenses are encompassed within descriptions of events pertaining to the transactions and claims of defective and excessively valued merchandise.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to enter a new order granting appellants' motion to vacate and set aside the default and default judgment. The parties are to bear their own costs on appeal.

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BOLAND, J.

We concur:

COOPER, P. J.

FLIER, J.